No. 15121

In the
United States Court of Appeals
For the Ninth Circuit

MATSUO YOSHIDA and CHISATO YOSHIDA,
Appellants,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a corporation,
Appellee.

Appellee's Reply Brief

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I.

CHRONOLOGY OF EVENTS

1. Gonzales' Driver's License Suspended.

On January 21, 1952, the Department of Motor Vehicles of the State of California suspended the driver's license of Sylvester M. Gonzales until he gave proof of ability to respond in damages as set forth in Section 414 of the California Vehicle Code. Defendant's Exhibit J; (Tr. p. 385). Said suspension order further provided as follows:

"Proof of ability to respond in damages is usually furnished by means of a financial responsibility insurance certificate filed with the Department of Motor Vehicles by an insurance company. If your insurance representative is not familiar with the requirements, ask him to contact the California Automobile Assigned Risk Plan, 200 Bush Street, San Francisco, California."

2. Application of Gonzales to the California Automobile Assigned Risk Plan.

On or about April 3, 1952, Gonzales filed his application for insurance under the California Automobile Assigned Risk Plan with his insurance representative and agent, Biebrach, Bruce and Moore, Inc., 40 West San Antonio Street, San Jose, California. The application was on a printed form furnished by the California Automobile Assigned Risk Plan. Plaintiffs' Exhibit 3; (Tr. p. 119). Under Item 10 of said application space is provided for the description of all automobiles registered in the applicant's name. It will be observed that no automobile is described in this space. Answering Item 15 of said application Gonzales wrote the answer "No" indicating that he did not have an auto registration in California. Answering Item 16 Gonzales wrote the answer "No" indicating that he did not have an operator's license in the State of California.

Gonzales testified by deposition that at the time his application was filed he did not own an automobile. (Tr. p. 217, L. 18-20). Neither did Gonzales have an

operator's license in the State of California at said time. (Tr. p. 221, L. 11-13).

The contention of appellants that Gonzales was illiterate and could not read the application is disputed by his own deposition testimony. He had completed two years in High School. (Tr. pp. 209-215). Appellee had nothing whatever to do with the preparation of the application or with the filing of the same. Said application was prepared under the supervision of the insurance representative of Gonzales. There was no opportunity afforded the appellee to review or approve the application. The failure of Gonzales to answer all of the questions set forth in the application was the sole responsibility of Gonzales; his insurance representative who was his agent, and the California Automobile Assigned Risk Plan. The reference at the top of page 18 of the appellants' Opening Brief to the footnote at the bottom of page 2 of the application is relied upon by the appellants to place the responsibility on the appellee for the alleged deficiencies which appear in the application. However the appellants leave out that part of said footnote which states "Note to Applicant and Producer." It is therefore apparent that the responsibility of reviewing said application rests solely with the applicant and producer. The first notice the appellee had concerning said application was when the same was mailed to appellee by the California Automobile Assigned Risk Plan.

Appellants lay considerable stress in support of their claims to the answers that Gonzales gave to Item 27 of the application which states:

> "Are you required to file evidence of financial responsibility?" and the answer is "Yes."
> "If the answer is 'yes' what form of certificate is required by the Motor Vehicle Department?" And after the following phrase, to-wit: "Owner and Operator."

Gonzales placed a cross. Appellants therefore assert that the indication by Gonzales that he was required by the Motor Vehicle Department to furnish a certificate that he was the owner and operator of an automobile was notice to the appellee that it should have issued an owner policy instead of a non-owner policy. However, the appellants entirely overlook the fact that the application on page 1, Item 10, clearly indicates that Gonzales did not own an automobile, and also that he was not driving an automobile for the reason that he did not have an operator's license in this State. (Items 15 and 16 of the application). Furthermore Gonzales testified in his deposition, as hereinafter pointed out, that he did not own an automobile and did not have a driver's license. Neither was Gonzales required under the order of the Motor Vehicle Department suspending his license to furnish a certificate of "Owner and Operator." Defendant's Exhibit J.

3. Letter to Appellee From the California Automobile Assigned Risk Plan.

The application of Gonzales was filed by his agent who was the producer with the California Automobile Assigned Risk Plan. On April 15, 1952, said plan for-

warded the application together with a letter of instructions, to the appellee. Plaintiffs' Exhibit 4, (Tr. p. 120); testimony of Mr. Merritt, (Tr. p. 311).

4. Investigation of Gonzales.

After receiving the application of Gonzales and the letter from the California Automobile Assigned Risk Plan the appellee received a report concerning an investigation which was made, or should have been made, with reference to Gonzales. A written report was furnished the appellee which was introduced in evidence as Plaintiffs' Exhibit 5. (Tr. p. 120). Said report states as follows:

> "Car. This car was not seen but at time of inspection was stated to be in good mechanical and operational condition. It is used for his own personal pleasure and . . . in local area. When not in use it is garaged at home."

Appellants contend that said investigation report was notice to the appellee that Gonzales owned an automobile at the time the insurance policy was issued. However said report merely refers to a car and there is no reference whatever to its ownership. Typical of most investigation reports the investigator was apparently investigating some person other than Gonzales. Gonzales testified in his deposition that the did not own an automobile when his application for insurance was filed, and further that he did not have a driver's license at said time. As hereinabove stated, the driver's license of Gonzales was suspended on January 21, 1952, and if Gonzales was driving any automobile at the time

of said investigation he would be guilty of a crime. The presumption that he was innocent of committing a crime would apply. Gonzales testified in his deposition that the first car he got after the insurance policy was issued, was when he obtained his operator's license, (Tr. p. 191) which the record shows was issued to him on June 15, 1952. Defendant's Exhibit C. (Tr. p. 299). There is nothing in the investigator's report which constitutes notice to the appellee that Gonzales owned an automobile at the time the insurance policy was issued, to-wit, May 3, 1952, and if any such inference can be made from said report it is dissolved by Gonzales in his sworn application for insurance and in his deposition.

5. Gonzales' Insurance Policy.

Jame H. Merritt, a witness called by the appellee, testified that he was the underwriting manager, Pacific Division, of the appellee corporation. He produced and identified the original records of the appellee pertaining to the automobile insurance policy issued to Gonzales, consisting of the following documents:

1. Declaration sheet which he read into the record as follows:

Sylvester M. Gonzales is the name of the insured; the policy number is AN61-P18692A; the address of Gonzales is 1539 East Santa Clara Street, San Jose; the effective date of the policy May 3, 1952 to May 3, 1953. In Item #3 of the declaration sheet, which is the space where the description of the automobile or other

pertinent facts are given, it is stated "Named Oprator's Policy 7921," which means that instead of insuring Gonzales for the ownership of an automobile, it is a restricted policy in that it applies only while Gonzales is operating an automobile not owned or registered by him, in accordance with an endorsement which it attached to and forms a part of the policy.

2. The next document identified by Mr. Merritt was stated by him to be an endorsement which formed a part of the policy; that it was issued at the time the policy itself was prepared and it indicates that the policy is a non-owner policy, and in accordance with the terms of the policy and the endorsement the insurance does not apply with respect to any automobile owned by Gonzales or a member of his household other than a private chauffeur or domestic servant. The declaration sheet and the endorsement were introduced in evidence as Defendant's Exhibit I. (Tr. p. 325). Mr. Merritt further testified that both the declaration sheet and the endorsement were a part of the policy which was mailed to Gonzales. Mr. Merritt identified Plaintiffs' Exhibit 8, which he said was the policy jacket; that it contained the so-called basic terms of the policy and that it is a general form that is used in connection with all automobile policies in California; that the same type of jacket was mailed to Gonzales. Mr. Merritt then testified that the declaration sheet and the endorsment were attached to an inside page of the jacket, page 3, so that when the policy is open page 1 and page 2, and then this other page turned at the declaration and the endorsement on top would have

been attached right there; that it is correct that the policy which was mailed to Gonzales included the jacket, which is Plaintiffs' Exhibit 8, and the declaration sheet and the non-owner policy endorsement, Defendant's Exhibit I. (Tr. pp. 303-310).

Mr. Merritt further testified that a copy of the declaration sheet and endorsement contained in the Gonzales policy were mailed to his agent, Biebrach, Bruch and Moore, Inc. (Tr. p. 360). Gonzales testified in his deposition that an insurance policy arrived at his home. (Tr. p. 191). On cross-examination Mr. Merritt testified that the automobile policy issued to Gonzales consisted of the jacket, Plaintiffs' Exhibit 8, and the declaration sheet and the non-owner endorsement, Defendant's Exhibit I. (Tr. p. 326).

The following provisions of the jacket, Plaintiffs' Exhibit 8, are pertinent, to-wit: Article IV, paragraph 4, which provides:

> "Newly Acquired Automobile — an automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the company within thirty days following the date of its delivery to him, and if either it replaces an automobile described in this policy or the company insures all automobiles owned by the named insured at such delivery date; but the insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured has other valid and collectible insurance. The named insured shall pay any additional premium

required because of the application of the insurance to such newly acquired automobile."

Also Article 12, which reads as follows:

"Action Against Company—Coverages A and B. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by writtn agreement of the insured, the claimant and the company. Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder."

The non-owner policy endorsement, Defendant's Exhibit I, so far as applicable, contains the following restriction:

"2. The insurance does not apply:

(a) to any automobile owned by the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;"

6. California Financial Responsibility Act Insurance Certificate.

Mr. Merritt testified that the appellee filed a certificate of financial responsibility with the California Department of Motor Vehicles which stated in substance that the appellee certifies that it has issued to or for the benefit of Sylvester M. Gonzales a motor vehicle liability policy as defined in Section 415 of the Motor Vehicle Code of the State of California. Mr. Merritt identified Plaintiffs' Exhibit 7 as the certificate which was filed by the appellee. This certificate shows that appellee had issued its policy to Gonzales covering the operation of any motor vehicle not registered to Gonzales and that said policy was "Named Operator's Policy 7921." The endorsement on said certificate, Plaintiffs' Exhibit 7, read as follows:

> "For use of The Department of Motor Vehicles Only. The original of this certificate was accepted on 5/23/1952 lmw under Section 415 of the Vehicle Code of the State of California as proof of ability to respond in damages.
> This copy to be returned to Liberty Mutual Insurance Company, Boston, Massachusetts."

Mr. Merritt further testified that the certificate form, Plaintiffs' Exhibit 7, is furnished by the State of California, (Tr. p. 339), and further stated that the intent of the appellee as an insurance carrier was to file a certificate with the Financial Responsibility Act in accordance with application, Plaintiffs' Exhibit 3, which said that there was no auto registration,

that the man (Gonzales) had no auto registration of this State and accordingly the appellee filed an operator's policy covering the operation of any motor vehicle not registered to the insured. (Tr. pp. 342-343). Obviously this was the right certificate as it was approved by the Department of Motor Vehicles.

7. Restricted Operator's License Issued to Gonzales.

On June 15, 1952, the Department of Motor Vehicles of the State of California, Division of Driver's Licenses, issued to Sylvester M. Gonzales an operator's license which contained the following restriction:

> "O.K. to add ins. restr. limited to operating vehicles which are not registered in the name of the licensee. 6-10-1952, lmw." Defendant's Exhibit C, (Tr. p. 299).

8. Gonzales Purchases a Ford Automobile.

Gonzales testified in his deposition that when he filled out his application he did not own an automobile but that after he got his operator's license he bought a Ford, which would be subsequent to June 15, 1952; that he bought the Ford in San Jose. In about two or two and one-half months after he bought the Ford he bought the Chevrolet; that he trade the Ford in on the Chevrolet; that he never gave notice or wrote a letter or sent any communication to the Liberty Mutual Insurance Company that he had bought a Ford and that he never wrote a letter or gave notice to the Liberty Mutual Insurance Company that he bought a

Chevrolet; that he never went to the office of the Liberty Mutual Insurance Company at any time until after the Yoshida accident, which was April 15, 1953. (Tr. pp. 217-224).

9. Gonzales Purchases a Chevrolet Automobile.

Gonzales purchased a Chevrolet automobile from O. K. Morton, San Jose, California. Plaintiffs' Exhibit 10. (Tr. p. 121). Said Exhibit 10 includes, among other matters, the following "Register to: Sylvester Gonzales." As hereinabove pointed out, Gonzales never gave notice of any kind to the appellee that he had purchased a Chevrolet automobile.

10. Registration of Chevrolet Automobile.

Subsequent to purchasing the Chevrolet there was issued to Gonzales by the Department of Motor Vehicles of the State of California an automobile certificate of ownership showing that he was the owner of a Chevrolet automobile in the year 1952. Defendants' Exhibit D, (Tr. p. 301).

11. The Lopez Accident.

In January, 1953, Gonzales claimed he was involved in an automobile accident with one Lopez. An accident report was filed with the appellee and there was certain correspondence with the appellee with reference to said accident. Plaintiffs' Exhibit 11, (Tr. p. 122). The appellee paid the claim that was filed by Lopez through an error and by mistake. The appel-

lants contend that the payment of the Lopez claim constituted a waiver by and estoppel of the appellee to deny liability to the appellants under the Gonzales non-owner automobile insurance policy. Mr. Merritt testified that said claim was paid because of a clerical error made by the clerk that completed the classification sheet in that the classification sheet failed to point out that the Gonzales policy contained a non-owner endorsement; that the appellee in paying the Lopez claim did so without any intention of the appellee thereby to waive any of the provisions of the Gonzales policy; that the appellee absolutely had no such intention and that the basis of the payment of the claim was purely an error on the part of the clerk who completed the classification sheet. (Tr. pp. 364-367). Appellants strenuously contend that the appellee as a matter of law is estopped to assert that its policy did not cover the Yoshida accident because as appellants claim Gonzales after the settlement of the Lopez claim believed he was covered while driving his Chevrolet automobile. There is no evidence that Gonzales ever knew that the Lopez claim was settled. On June 25, 1953, Sylvester Gonzales signed, swore to and filed a certificate of non-operation with the California Department of Motor Vehicles and stated therein as follows:

> "The undersigned hereby certifies that Chevy 6 Engine No. 234531 was not operated from Dec. 31, 1952, inclusive, to June 25, 1953, inclusive; affiant further says that the above described vehicle was in storage during said entire time at Address 1814 Kearney, Los Angeles or was not operated on Cali-

fornia highways by reason of the following facts: Not in running condition (signed) Sylvester M. Gonzales, Address 1814 Kearney St., L. A. Calif."

Defendant's Exhibit E, (Tr. p. 301). The above described Chevy is the car that was involved in the Yoshida accident.

In addition to the complete absence of any evidence to support the doctrine of estoppel or waiver against the appellee it is difficult to understand how Gonzales believed that he was covered by the appellee's insurance policy in driving his Chevrolet automobile after the Lopez accident when he swore in his non-operation certificate that he had not driven said Chevrolet at any time during the period from December 31, 1952, to June 25, 1953. The appellee will elaborate on the failure of the appellants to show estoppel or waiver under the heading "Argument of the Law."

12. The Yoshida Accident.

On April 15, 1953, Gonzales was involved in an automobile accident with Mrs. Yoshida, who was a pedestrian. Plaintiffs' Exhibit 13. This is the accident upon which the appellants complaint in this case based. After the Yoshida accident occurrd the investigation made by the appellee disclosed that the Chevrolet automobile which Gonzales was driving at the time of the Yoshida accident was owned by Gonzales and was registered to him, whereupon the appellee disclaimed any liability to Gonzales under its non-owner automobile insurance policy issued to Gonzales on May 3, 1952.

Defendant's Exhibits F and G, (Tr. p. 302) and Defendant's Exhibit H, (Tr. p. 303).

ARGUMENT OF THE LAW

A

The Rule of Construction of the Policy

Appellee refers to the decision of this Honorable Court in the case of *Home Indemnity Company of New York v. Standard Accident Co.,* 167 Fed. 2d, 919, 923, 924, in reply to all of the authorities cited by appellants on pages 11 to 14, inclusive, of their Opening Brief. The atmosphere of confusion which appellants attempt to create from their strained interpretation and application of the ordinary words "owner" and "registration," as used in the Gonzales insurance policy and the other documents introduced in evidence at the trial, is nothing more than semantic quibbling. The insurance policy is restricted by the non-owner endorsement covering the insured only when he was driving an automobile which was not owned by him. Defendant's Exhibit I. The Chevrolet automobile that was involved in the Yoshida accident was owned by Gonzales. Furthermore Gonzales did not notify the appellee at any time that he had acquired the ownership of said Chevrolet as required by Article IV, paragraph (4) of the policy, hereinabove set forth. Plaintiffs' Exhibit 8. There is no uncertainty or ambiguity in the insurance policy, including the jacket. Plaintiffs' Exhibit 8, or the declaration sheet or the non-owner endorsement attached to the policy. Defendant's Exhibit I. The opinion of this Honorable Court

in the above cited case lays down the principle of the law of construction which is applicable under the circumstances and evidence in this case at pages 923 and 924 as follows:

> "[2] The ancient rule that all intendments in an insurance policy are to be construed favorable to the insured has one important limitation; namely, that where the language of any given provision of the policy is clear, that language must be followed. In other words, where there is no ambiguity, there is nothing left to be construed. In such a situation, when a party seeks to read something into the contract of insurance that is not there, a court must perforce say, with Shylock,—
>
> 'Is it so nominated in the bond? . . .
> I cannot find it; 'tis not in the bond.'
>
> This is the teaching of the cases in California and elsewhere. In *Carabelli v. Mountain States Life Ins. Co.,* 8 Cal. App. 2d 115, 117, 118, 46 P. 2d 1004, 1006, hearing denied by th Supreme Court of the State, the court said:
>
> 'The general rule is that an insured must bring himself within the express terms of the policy before he is entitled to recover thereon, and where these terms are plain and explicit, the courts cannot create a new contract for the parties by a forced construction of such plain and explicit terms. Thus the rule of liberal construction in favor of the insured can only have application when the policy presents some uncertainty or ambiguity. [Cases Cited].'
>
> The same doctrine has been recognized by this court.

In *Fidelity Union Fire Ins. Co. v. Kelleher,* 9 Cir., 13 F. 2d 745, 746, Judge Hunt said:

"Following the steadily adhered to decisions of the Supreme Court, it is seen that the present case is directly within the well settled rule of the federal courts, that the terms of the policy are the measure of the liability of the insurer, and that, to recover, the insured must prove that he is within those terms. In *Imperial Fire Ins. Co. v. Coos County,* 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231, the court said:

'It is immaterial to consider the reason for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consists simply in enforcing and carrying out the one actually made.' "

See also:

Standard Accident Ins. Co. of Detroit, Mich. v. Winget, 197 Fed. 2d, 97, 107;

Hawkeye-Security Insurance Co. v. Meyers, 210 Fed. 2d, 890, 893;

Nettles v. General Accident Fire and Life Assurance Corporation, 234 F. 2d, 243, 247.

B

The Yoshida Accident was Not Covered by the Policy

1. Under the terms of the Gonzales insurance policy and the non-owner endorsement Gonzales was not covered when driving an automobile owned by him. The Chevrolet automobile involved in the Yoshida accident was owned by Gonzales.

2. Gonzales did not give notice to appellee at any time that he had acquired the ownership of the Chevrolet automobile as required by Article IV, Paragraph (4) of the policy. The appellee was therefore entitled to deny liability under the terms of the policy for the Yoshida accident.

Home Indemnity Co. of New York v. Standard Accident Co., 167 Fed. 2d, 919, 923, 924;

Fidelity and Casualty Company of New York v. Reece, 223 Fed. 2d 1, 114;

Iowa National Mutual Ins. Co. v. Richards, 229 Fed. 2d, 210;

Olds v. General Accident Fire etc. Corp., 67 C. A. 2d, 812, 821, 155 P. 2d 676; hearing denied by Supreme Court;

Kindred v. Pacific Auto Ins. Co., 10 C. 2d, 463, 465, 466;

State Compensation Ins. Fund v. Bankers Indem. Ins. Co., 106 Fed. 2d, 368;

Carabelli v. Mountain States Life Ins. Co., 8 Cal. App. 2d, 115, 117, 118; (Petition for hearing denied by the Supreme Court);

Sears v. Illinois Indemnity Co., 121 Cal. App. 211;

Purcell v. Pacific Automobile Ins. Co., 19 C. A. 2d, 230; (Petition for hearing in Supreme Court denied);

Margellini v. Pacific Automobile Ins. Co., 33 C. A. 2d, 93; (Petition for hearing in the Supreme Court denied);

American Motorists Ins. Co. v. Moses, 111 C. A. 2d, 444; (Petition for hearing by the Supreme Court denied);

Globe Indemnity Co. v. Liberty Mut. Ins. Co., 138 Fed. 2d 180, 184;

Collins v. United States, 161 Fed. 2d, 67, Syl. 2-4;

Fidelity and Casualty Company of New York v. Reece, 223 Fed. 2d, 114.

C

Insurance Producer was Agent of Gonzales

The firm of Biebrach, Bruch and Moore, Inc., who appeared on Gonzales' application for insurance, Plaintiffs' Exhibit 3, as the producer of record was the agent of Gonzales.

Iowa National Mutual Ins. Co. v. Richards, 229 Fed. 2d, 210.

D

The Doctrine of Estoppel or Waiver Is Not Applicable

The appellants claim that the appellee is estopped from denying liability on the Gonzales policy because of its payment of the Lopez claim. However, the only evidence in the record concerning the circumstances which caused the payment of the Lopez claim is the testimony of Mr. Merritt, who testified that the payment of said claim by the appellee was brought about by a clerical error, and it was not the intention of the appellee to waive any of the provisions of the Gonzales insurance policy in making said payment. The appellants offered no evidence whatever to contradict the testimony of Mr. Merritt and it is therefore undisputed that the appellee is not estopped or did not waive any of its rights under the Gonzales insurance policy by erroneously paying the Lopez claim. The application of the rule of estoppel under the circumstances in this case is stated by the Supreme Court of the United States in the case of *Insurance Company v. Wolff,* 95 U. S., 326, 24 L. Ed. 387, as follows:

> "The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is

essential that the Company sought to be estopped from denying the waiver claimed should be apprised of all the facts; of those which create the forfeiture, and of those which will necessarily influence its judgment in consenting to waive it."

See also:

McDaniels v. General Ins. Co., 1 Cal. App. 2d, 454, 459, 460, 461, 462;
Mirich v. Underwriters at Lloyd's London, 64 C. A. 2d, 522, 530, 531.

E

Conditions Precedent

Article 12 of the insurance policy, Plaintiffs' Exhibit 8, provides that the insured must fully comply with all of the terms of the policy as a condition precedent to bringing an action against the company on the policy. This provision is also applicable to the appellants as a condition precedent to the success of their lawsuit. The opinion of this Honorable Court in the Home Indemnity case hereinabove referred to correctly defines the law applicable to Article 12 of the insurance policy, at page 929, as follows:

"[6, 7] The appellant's policy specifies that 'No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy'. There is nothing contrary to public policy in this provision, and it should be enforced according to its terms.

Under the Civil Code of California, a condition precedent is given the same force as that indicated in the policy that we are now considering. Section 1439 provides in part:

'Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; . . . '

In our opinion, the law governing conditions precedent in insurance contract is correctly stated in *Whittle v. Associated Indemnity Corporation,* 130 N.J.L. 576, 33 A. 2d 866, 868, 869, in which there was considered a policy having a clause in identically the same language as that quoted above. There the Court of Errors and Appeals said:

'These conditions are not, as urged, conditions subsequent. . . . In the case at bar the stated conditions by the very terms of the policy (Condition 10) are made conditions precedent. . . . Moreover, we have held that they are 'conditions in the nature of a promissory warranty,' and that they are 'conditions precedent to the right of recovery.'

. . .

''And if the test were that it must be shown that the failure to fulfill the conditions precedent prejudiced the insurer, the trial judge might well have been justified, under the proofs, in submitting the case to the jury. But that is not the test. The test is: Was a condition precedent of the policy unfulfilled by the assured? If it was then, if the insurer so chooses and it did so choose, the policy is at an end . . . , for 'there has been a failure to fulfill a condition upon which (insurer's) obligation is dependent.' *Coleman v. New Amsterdam Casualty Co.* [supra].

The 'construction and effect of a written instrument is a matter of law to be determined by the court and not by the trier of fact.' And in the absence of an infirmity in a contract (none is here alleged) our 'function' is to 'enforce a contract as it is written'. And if the 'insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss.' . . . In short, the law does not make a better contract for the parties than they chose to make for themselves. [Case cited]."

"In the instant case, the 'insured cannot bring himself within the conditions of the policy.' Accordingly, we hold that 'no action shall lie against the company.' "

F

The Appellants Stand in the Shoes of Gonzales Quod the Policy

Home Indemnity Co. of New York v. Standard Accident Insurance Company, supra;
Olds v. General Accident Co., supra;
Kindred v. Auto Insurance Co., supra.

G

The Court's Findings

Appellants object to the sufficiency of the findings of the Court, but the appellee believes that the findings fully comply with FRCP Rule 52(a). Appellants are mistaken when they state there is no special finding on the issue of estoppel. Finding No. 15 covers the issue of estoppel and waiver. Also Conclusions of Law, Paragraph No. 6, on the issue of estoppel is likewise a finding of fact.

Carr v. Yokohama Species Bank, Ltd., 200 Fed. 2d, 251, 255;
Central Ry. Co. v. Longden, 194 Fed. 2d, 310, 317, 318;
Benrose Fabrics Corp. v. Rosenstein, 183 Fed. 2d, 355, 357.

CONCLUSION

For each and all of the foregoing reasons the judgment of the District Court should be in all respects affirmed.

Respectfully submitted,

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